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BEFORE THE ARIZONA CORPORATION COMMISSION

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BOB STUMP
COMMISSIONER

In the Matter of Arizona Public Service
Company and Verizon California, Inc.'s
Joint Petition for the Establishment of an
Underground Conversion Service Area

) Docket No. E-01345A-07-0663
) Docket No. T-01846B-07-0663

) **VERIZON CALIFORNIA, INC.'S**
) **CLOSING BRIEF**

INTRODUCTION

On November 27, 2007, Arizona Public Service Company ("APS") and Verizon California, Inc. ("Verizon") (collectively, the "Petitioners") filed with the Arizona Corporation Commission ("Commission") a Joint Petition to Establish an Underground Conversion Service Area ("UCSA") as required by Arizona Revised Statutes ("Joint Petition"). On January 18, 2008, a full evidentiary hearing was held in this matter at the Commission's offices in Phoenix, Arizona. On May 16, 2008, a Recommended Opinion and Order ("ROO") was issued for further consideration by the Commission. The ROO was placed on the Open Meeting Agenda for July 1, 2008. At the Open Meeting on July 1, 2008, the Commission discussed the ROO at length and ultimately determined that the matter should be pulled from the agenda without decision to allow the parties to file additional information in the docket going to the issue of the economic feasibility of the UCSA for the Hillcrest Bay property owners. On July 3, 2008, the Hearing Division

1 issued a Procedural Order keeping the record open to allow the creation of a more fully
2 developed evidentiary record on the issue of economic feasibility.

3 On April 1, 2009, a Notice of Appearance was filed by attorneys hired to represent
4 Hillcrest Bay, Inc. ("HBI"), one of the owners. On May 1, 2009, APS filed an Economic
5 Feasibility Update for the UCSA in which APS indicated that it did not anticipate that the
6 costs of the UCSA would decrease based upon labor and material costs associated with
7 various projects performed in the Hillcrest Bay area. APS also stated that, since the ROO
8 was issued, 14 additional owners had filed letters requesting to change their votes to "No"
9 due to changes in the economy, loss of jobs, or changed financial circumstances.

10 Also on May 1, 2009, HBI filed Updated Documentation in Support of UCSA. On
11 May 11, 2009, the Hearing Division issued a Procedural Order setting an additional
12 evidentiary hearing specifically related to economic feasibility,¹ the current level of owner
13 support for the UCSA, and the standard for Commission approval of the UCSA.

14 On July 21 and 22, 2009, an additional evidentiary hearing was held in this matter
15 at the Commission's offices in Phoenix, Arizona. At the conclusion of the additional
16 evidentiary hearing, the ALJ requested the parties brief the issues set forth in Sections I-V
17 below.

18
19 **I. What is the standard of approval for a petition to establish a UCSA and has it
been met in this case?**

20 The standard of approval for a petition to establish a UCSA is set forth in various
21 sections of the UCSA statutes.² The analysis starts with an inquiry into whether the
22 petitioners have satisfied certain threshold criteria, including a petition supported by the
23 owners of at least 60% of the parcels within the proposed UCSA who own at least 60% of

24
25 ¹ As to economic feasibility, the Commission believed that evidence should be received as to changes in
costs, changes in the utilities' and the owners' ability to pay the costs, and the benefits of the UCSA.
Procedural Order at 4 n.6 (May 11, 2009).

26 ² See A.R.S. § 40-341, *et seq.*

1 the land in the proposed UCSA. After finding that the threshold criteria have been
2 satisfied, the Commission may use its discretion in deciding whether to grant or deny the
3 petition, but must consider the factors in A.R.S. § 40-346(A), including, most
4 significantly, the economic feasibility of the project for the affected property owners. In
5 this case, in light of the conclusions in the ROO and the number of property owners who
6 asked, after the January 8, 2008 deadline, that their names be withdrawn from the petition,
7 it appears that the threshold criteria were not satisfied. Even if the Commission ultimately
8 finds that the threshold criteria were satisfied, it has the discretion to deny the petition as
9 economically infeasible based on the decline in support for the project among the Hillcrest
10 Bay property owners.

11 **A. Threshold Requirements**

12 Property owners desiring to establish a UCSA and the relevant public service
13 corporations ("PSCs") must satisfy certain procedural requirements in order for the
14 petition to be approved by the Commission. These requirements include: (1) the
15 preparation of a cost study by the utilities and the provision of that cost study to
16 landowners within the proposed UCSA,³ (2) a subsequent petition signed by the owners of
17 at least 60% of the parcels within the proposed UCSA who own at least 60% of the land
18 within the proposed UCSA,⁴ and (3) the recordation of liens against each parcel within the
19 proposed UCSA for the underground conversion costs for which that parcel will be liable.⁵
20 In addition to these procedural requirements, the Commission must determine at a hearing
21 "that owners of no more than forty percent of the real property within the underground
22 conversion service area, or no more than forty percent of the owners of real property, have
23 not objected to the formation of the underground conversion service area."⁶

24 ³ A.R.S. § 40-342(D) & (F).

25 ⁴ A.R.S. § 40-343(A).

26 ⁵ A.R.S. § 40-343(D).

⁶ A.R.S. § 40-346(A).

1 **1. Procedural Requirements**

2 The first and third procedural requirements have been satisfied in this case and no
3 party to the proceeding has argued otherwise. According to the ROO, the second
4 requirement was not satisfied in this case: "Property owners owning 59.690 percent of the
5 total square footage of the proposed UCSA support the establishment of the UCSA."⁷
6 Even if the timely request for withdrawal of support by Ms. Erna L. Davis is ruled
7 ineffective under the requirements of A.R.S. § 40-345,⁸ the ROO's conclusion that Parcel
8 274 should be included in the total square footage of the UCSA lowers the support for the
9 petition, on a square footage basis, to 59.99%.⁹ Thus, unless Parcel 274 is excluded from
10 the proposed UCSA under A.R.S. § 40-346(B), the threshold criteria were not satisfied in
11 this case.

12 If the Commission determines that the owners of at least 60% of the land within the
13 proposed UCSA supported the second petition as of the original deadline for withdrawals
14 (January 8, 2008), it should also consider the effect of landowners who changed their
15 position after the deadline. As discussed in Section III below, the statutes do not provide
16 guidance as to whether the deadline for withdrawals and objections was reset as a result of
17 the second hearing. However, based on Staff's and APS' calculations in their latest
18 filings, if these withdrawals are given effect, the petition was not supported by 60% in
19 terms of parcels or square footage regardless of whether Parcel 274 is included in the
20 calculations.¹⁰

21 ...

22 _____
23 ⁷ Recommended Opinion and Order at 48 (May 16, 2008).

24 ⁸ See Section II below for Verizon's analysis of this issue.

25 ⁹ Recommended Opinion and Order at 15 (May 16, 2008).

26 ¹⁰ See Arizona Public Service Company and Verizon California, Inc.'s Brief Pursuant to Procedural Order Dated May 11, 2009, at 6 (July 6, 2009) (calculating current support for the petition of 55.23% and 55.03%); and Staff's Responsive Brief at 5 (July 6, 2009) (calculating maximum support for the petition at 54.7% and 54.2%).

1 **2. Requirement of A.R.S. § 40-346(A)**

2 If the Commission determines that the procedural requirements have been satisfied,
3 it must next consider the requirement in A.R.S. § 40-346(A) that “owners of no more than
4 forty per cent of the real property within the underground conversion service area, or no
5 more than forty per cent of the owners of real property, have not objected to the formation
6 of the underground conversion service area.” As discussed in previous briefs, the double
7 negative in this requirement is a clear error. If read literally, the requirement would be
8 satisfied if even 1% of the property owners within a proposed UCSA did not object to its
9 formation.

10 Based on previous Commission Orders, it appears that the Commission has
11 resolved this contradiction by ignoring the negative language of A.R.S. § 40-346(A) and
12 focusing on the requirement of 60% approval,¹¹ which if attained would necessarily mean
13 that less than 40% disapproved of the conversion. The Commission should interpret
14 A.R.S. § 40-346(A) to require two separate findings: (1) that the owners of at least 60% of
15 the parcels within the proposed UCSA support the petition; and (2) that owners of at least
16 60% of the land in the proposed UCSA support the petition. If the percentage of
17 objections on either basis exceeds 40%, then the threshold requirements for establishing a
18 UCSA have not been met and the petition should be denied.

19 **B. Commission’s Exercise of Discretion**

20 Once the Commission has determined that the threshold requirements have been
21 satisfied, it must consider several factors under A.R.S. § 40-346(A) including: (1) whether
22 “the cost of conversion ... is economically and technically feasible for the public service
23 corporations”; (2) whether “the cost of conversion ... is economically and technically
24 feasible for ... the property owners affected”; and (3) whether “the underground

25

26 ¹¹ *In re Tucson Electric Power Company*, Decision 55490; *In re Mountain State Telephone and Telegraph*,
Decision 57051; and *In the Matter of Qwest Corporation’s Petition for the Establishment of an*
Underground Conversion Service Area, Docket No. T-01051B-04-0276.

1 conversion service area is a reasonably compact area of reasonable size.” As discussed in
2 prior briefs in this proceeding, there is no further guidance on the Commission’s
3 application of either the first or third factors. However, neither one has been at issue in
4 this proceeding. Similarly, the technical feasibility of the undergrounding project for the
5 affected property owners has not been questioned. Therefore, the Commission’s exercise
6 of discretion in this case should focus on the economic feasibility of the project for the
7 property owners within the proposed UCSA.

8 In previous cases, Staff’s recommendations and the Commission’s decisions
9 regarding the economic feasibility of a UCSA project for affected property owners has
10 focused primarily on support for and opposition to the petition from property owners
11 within the proposed UCSA.¹² The presumption has apparently been that the 60% support
12 requirement is a reasonable indication that the project is economically feasible for the
13 affected property owners as a whole. However, it is within the Commission’s discretion to
14 find that a severe adverse economic impact on a less than 40% portion of property owners
15 renders a project economically infeasible. If the Commission reaches this point of the
16 analysis in this case, it should consider the opposition to this UCSA petition based on
17 adverse economic impacts in exercising its discretion.

18 **II. How should the Commission analyze the validity of withdrawals of signatures**
19 **and objections given the language of A.R.S. § 40-345(1) and Decision No.**
20 **67437?**

21 The Commission should reject HBI’s arguments regarding the invalidity of
22 withdrawals and objections based on A.R.S. § 40-345(1). Decision No. 67437 in Docket
23 No. T-01051B-04-0276 demonstrates that the Commission has, in the recent past, held that
24 requests for withdrawals of signatures from a petition to establish a UCSA complied with
25 A.R.S. § 40-345(1) even when submitted without an accompanying affidavit.

26 ¹² See Arizona Public Service Company’s, Verizon California Inc’s and Arizona Corporation Commission
Staff’s Joint Closing Brief Analyzing the Standard for Commission Approval of an Underground
Conversion Service Area at 2-5 (Feb. 19, 2008).

1 **A. Analysis under A.R.S. § 40-345(1)**

2 In its most recent brief in this proceeding, HBI argues that many of the objections
3 submitted so far in this case are invalid under the statutory requirements for objections in
4 A.R.S. § 40-345. This section states:

5 In determining protests, withdrawals of signatures and objections, the
6 corporation commission ... shall be guided by the following rules: (1) Each
7 paper containing signatures shall have attached thereto an affidavit of an
8 owner of real estate within the proposed underground conversion service
9 area, stating that each signature was affixed in his presence and is the
10 signer's genuine signature. ...

11 HBI's interpretation of this section is that "[t]he Act requires that each objection be
12 accompanied by an 'affidavit of an owner of real estate' attesting to the validity of the
13 signatures on the objection."¹³

14 HBI's interpretation is plausible; however, the proper response in this situation is
15 not invalidation of the objections and withdrawals filed without the required affidavits. It
16 is not reasonable to expect the property owners who filed objections and withdrawals in
17 this case to have complied with A.R.S. § 40-345(1). Pursuant to the Procedural Order
dated May 11, 2009, APS and Verizon were required to publish and post notice of the
additional hearing, which included the following provision:

18 **Any owner who desires to (1) withdraw the owner's signature** from the
19 **petition of owners requesting establishment of the UCSA, (2) object to the**
20 **establishment of the UCSA, or (3) object to the underground**
21 **conversion costs** included in the joint report for the owner's parcel within
22 the proposed UCSA **must file an objection/withdrawal of signature** with
23 the Commission's Docket Control, 1200 West Washington, Phoenix,
24 Arizona 85007, by **July 10, 2009**. Any objection/withdrawal shall include
the owner's full name, mailing address, telephone number, and signature;
the address and/or parcel number for the owner's property within the
proposed UCSA; the docket number provided above; and a short
explanation of what the owner wishes to do (withdraw signature or object)
and why. The Commission will determine the legal effect of these
withdrawals/objections after the hearing in this case.

25
26

¹³ Hillcrest Bay, Inc.'s Pre-Hearing Brief at 7 (July 6, 2009).

1 This Procedural Order did not require an affidavit of a homeowner within the
2 UCSA.¹⁴ Considering the Commission's past practice of not requiring affidavits (as
3 discussed below) and the attempts of property owners to comply with the notice, rejecting
4 the objections and withdrawals would be unfair to the property owners who have
5 attempted to object to the petition or have their signatures removed from it.¹⁵ Even if the
6 Commission determines that the objections and withdrawals are invalid under A.R.S. § 40-
7 345(1) (*i.e.*, they cannot be considered in determining whether the 60% support
8 requirements of A.R.S. §§ 40-343(A) and 346(A) have been satisfied), it should still
9 consider their contents when determining the economic feasibility of the project.

10 **B. Analysis under Decision No. 67437**

11 The Commission's Decision No. 67437 confirms that it has not previously required
12 property owners to support their objections or requests for withdrawal with an affidavit.
13 In that case, 17 property owners filed their objection to the petition, including three who
14 requested their names be withdrawn from the petition. None of these objections or
15 requests for withdrawal included an affidavit.¹⁶ Not only did the Commission give effect
16 to the objections and withdrawals, dismissing the case for "failure to obtain approval" of
17 the UCSA,¹⁷ it specifically concluded that they were "filed ... in accordance with A.R.S.

18
19 ¹⁴ The Commission's December 6, 2007 Procedural Order contained a different notice requirement which
20 did include a reference to A.R.S. § 40-345 ("For additional requirements related to withdrawals and
21 objections, please see A.R.S. § 40-345, available on the website for the Arizona State Legislature
(www.azleg.gov).")

22 ¹⁵ While Verizon recognizes that not all property owners who filed objections and requests for withdrawals
23 fully complied with the instructions in the published notice, it appears that most made a good faith effort to
24 comply.

25 ¹⁶ *In the Matter of Qwest Corporation's Petition for the Establishment of an Underground Conversion
26 Service Area*, Docket No. T-01051B-04-0276, Consumer Comments - In Opposition (May 10, 2004). Note
that the property owners' signed "certification" at the bottom of the first page of this filing is not an
affidavit. An affidavit is "[a] voluntary declaration of facts written down and sworn to by the declarant
before an officer authorized to administer oaths." Black's Law Dictionary at 62 (8th ed. 2004).

¹⁷ *In the Matter of Qwest Corporation's Petition for the Establishment of an Underground Conversion
Service Area*, Docket No. T-01051B-04-0276, Opinion and Order at 7 (Dec. 3, 2004).

1 § 40-345.”¹⁸ This case illustrates that the past practice of the Commission has not required
2 compliance with A.R.S. § 40-345(1) and supports the conclusion that rejecting the
3 objections and requests for withdrawal in the present case would be inappropriate.

4
5 **III. Did the new hearing provide property owners a renewed opportunity to make
timely withdrawals of signatures and objections?**

6 A.R.S. § 40-344(A) requires property owners who want to withdraw their signature
7 from a petition or to object to the establishment of a UCSA to do so “no later than ten days
8 before the date set for the hearing.” “[T]he hearing” referenced in this section is the
9 hearing that the Commission must hold after receiving a petition to establish a UCSA from
10 a PSC under A.R.S. § 40-343(B). The section that addresses this hearing, A.R.S. § 40-
11 344, clearly assumes that the Commission will hold only one hearing on each petition and
12 that it will be held between 30 and 60 days after the Commission receives the petition.

13 In this case, the Commission provided for the possibility of a second evidentiary
14 hearing approximately 16 months after the initial hearing on January 18, 2008.¹⁹ It is
15 unclear whether the statute allows for an additional hearing after the 60 day limit has
16 passed. There is no case law that addresses this issue, and the statute is silent regarding
17 any tolling provision.²⁰ If the Commission determines that the hearing timeframe was
18 tolled, it would appear that the deadline for objections and withdrawals should be reset
19 accordingly.²¹ No party to this proceeding would be unfairly prejudiced by setting the

20 ¹⁸ *Id.* at 5.

21 ¹⁹ Procedural Order at 3 (July 3, 2008) (“IT IS FURTHER ORDERED that if additional filings
22 contemplated by this Procedural Order are made by May 1, 2009, the Hearing Division shall determine
whether additional hearing is necessary in this matter.”).

23 ²⁰ The statute does provide that the Commission has the authority to conduct additional hearings to
24 determine whether additional territory should be included in the conversion areas pursuant to A.R.S. § 40-
346(B).

25 ²¹ The Commission clearly intended property owners be allowed to change their position during this
26 interim period. Procedural Order at 2-3 (July 3, 2008) (“IT IS FURTHER ORDERED that APS, Verizon,
and Hillcrest Bay owners may file, no later than May 1, 2009, documentation going to the issue of the
economic feasibility of the UCSA for the Hillcrest Bay owners. If the parties supporting the UCSA make
such a filing, they shall ensure that it contains at least the following: ... (4) a new petition listing each

1 deadline for withdrawals and objections at ten days before the latest hearing and the
2 purpose of the deadline would not be defeated.²²

3 Regardless of whether the Commission has authority to conduct additional hearings
4 on the original Joint Petition, or to allow for the withdrawal of signatures from the petition
5 after the original deadline, the Commission still has the discretion to weigh such
6 withdrawals as part of its economic feasibility analysis.

7
8 **IV. Is dismissal of the case appropriate based on the current level of support for
the petition?**

9 It would be appropriate for the Commission to dismiss the petition based on its
10 current lack of support from property owners within the proposed UCSA. As discussed in
11 Section I, a threshold requirement for the approval of a petition is support from owners of
12 at least 60% of the parcels within a proposed UCSA who own at least 60% of the land in
13 the proposed UCSA.²³ The ROO held that the petition was supported by owners of
14 59.690% of the land within the proposed UCSA.²⁴ Since the original deadline for
15 withdrawals, support for the petition has dropped well below 60% in terms of both parcels
16 and square footage.²⁵ If, based on its determination of the various issues discussed in this
17 brief, the Commission concludes that the petition fails to satisfy the threshold
18 requirements of either A.R.S. § 40-343(A) or § 40-346(A), it must deny or dismiss it.
19 Even if the Commission determines that these sections have been satisfied, it still has
20 discretion to deny the petition based on economic infeasibility for the affected landowners.

21
22 _____
parcel, indicating whether the owner/s of each parcel support or oppose the UCSA, and including the dated
signature of an owner of each parcel ...”).

23 ²² See Arizona Public Service Company and Verizon California, Inc’s Brief Pursuant to Procedural Order
Dated May 11, 2009, at 5-6 (July 6, 2009) (discussing the importance of procedural deadlines to the proper
functioning of government).

25 ²³ A.R.S. §§ 40-343(A) and 40-346(A).

26 ²⁴ Recommended Opinion and Order at 48 (May 16, 2008).

²⁵ See *supra* note 10.

1 **V. Under the statutes, can service costs be allocated on a square footage basis as**
2 **was done by Tades?**

3 The UCSA statutes clearly envision that service costs²⁶ associated with an
4 underground conversion will be billed and collected on an individual, lot-specific basis.
5 A.R.S. § 40-348 addresses work performed on private property as part of an
6 undergrounding project:

7 (A) The service facilities within the boundaries of each lot or parcel within
8 an [UCSA] shall be placed underground at the same time as or after the
9 underground system in private easements and public places is placed
underground. The [PSC] ... involved ... shall, at the expense of the owner,
convert to underground its facilities on any such lot or parcel

10 (B) If the property owner does not reimburse the [PSC] ... in cash for all
11 such costs or expenses ... within thirty days after completion of such
12 conversion, ... such costs shall be included in the costs on which the
underground conversion cost for such property is calculated, as provided by
this article.

13 Accordingly, A.R.S. § 40-347 provides for the inclusion of unpaid service costs in each
14 owners' assessed share of underground conversion costs.²⁷ In addition, PSC's are
15 specifically required to estimate service costs individually in their Joint Report and to
16 include service costs associated with each parcel in estimates sent to property owners.²⁸
17 The statutes also require property owners to agree to pay service costs associated with

18 ²⁶ Although the phrase is not defined, or even used, in the UCSA statutes, "service costs", as used in this
19 brief and in the UCSA context generally, refers to the costs of undergrounding facilities that run from
20 "public places", as defined in A.R.S. § 40-341(9), up to the "point of delivery" (with respect to electrical
facilities) or the "connection point within the house or structures" (with respect to communications
facilities).

21 ²⁷ A.R.S. § 40-347(A)(4) (underground conversion costs must include, "[i]f not paid in full as provided in
22 section 40-348, the actual cost of converting to underground the facilities from the public place to the point
23 of delivery on the lot or parcel owned by each owner receiving service [(electrical facilities)], or to the
connection point within the house or structures [(communications facilities)], less any credit which may be
given such owner under the line extension policy of the public service corporation").

24 ²⁸ A.R.S. §§ 40-342(D) (requiring the Joint Report in response to a petition for establishment of a UCSA to
25 "indicate the estimated cost to be assessed to each lot or parcel ... for placing underground the facilities of
the public service corporation ... located within the boundaries of each parcel or lot"); and 40-342(F)
26 (requiring PSC's to mail property owners within a proposed UCSA "[a] summary of ... the estimated costs
to be assessed to each lot or parcel of real property for placing underground the facilities of the public
service corporation ... located within the boundaries of each parcel or lot").

1 their property before the work is performed.²⁹ Finally, A.R.S. § 40-350 provides that if
2 actual service costs associated with a particular parcel are less than the initial estimates of
3 those costs, then the reduction in costs will be passed on to the parcel's owner.³⁰

4 Despite the assumption throughout the UCSA statutes that service costs will be
5 billed and collected on a lot-specific basis, A.R.S. § 40-347(D) provides that a PSC may
6 "by agreement with all the owners of property in an underground conversion service area
7 provide for reimbursement to it of the cost of such conversion on a different basis as to
8 payment or security than that set out by the terms of this article." This subsection gives
9 utilities and property owners the freedom to devise their own method of allocating the
10 costs of an underground conversion project. However, it also requires unanimous
11 agreement by the property owners in order to deviate from the methods described in the
12 statutes.³¹ Property owners in this case have certainly not agreed to allocate service costs
13 in any particular way and, therefore, service costs must be allocated on an lot-specific
14 basis as provided by the statutes.

15 ...

16 ...

17 ...

18 ...

19 ...

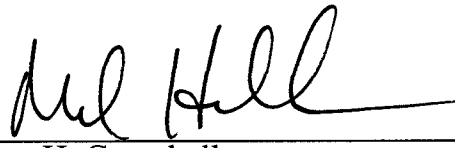
21 ²⁹ A.R.S. § 40-349(A) ("The public service corporation ... shall not commence the work referred to in
22 section 40-348 ... until the owner has furnished a permit or easement to the public service corporation ...
agreeing to the inclusion of the costs thereof in the underground conversion service costs in the event such
costs or any part thereof remain unpaid thirty days after completion.").

23 ³⁰ A.R.S. § 40-350(A) ("[I]n the event the actual cost of converting to underground the facilities from the
24 public place to the point of delivery is less than the estimated cost for such conversion then the
underground conversion costs to be paid by the owner of such lot for such conversion shall be reduced.").

25 ³¹ Considering that any allocation method benefitting one property owner would increase the costs of at
26 least one other property owner (assuming total costs paid by property owners are constant), it seems highly
unlikely that property owners within a proposed UCSA would ever unanimously agree to any allocation
method.

1 RESPECTFULLY SUBMITTED this 26th day of August, 2009.

2 LEWIS AND ROCA, LLP

3
4
5 By 
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26th day of August, 2009, with:

11 Arizona Corporation Commission
12 Docket Control – Utilities Division
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Phoenix, Arizona 85007

14 COPY of the foregoing hand-delivered
this 26th day of August, 2009, to:

15 Sarah Harpring
16 Administrative Law Judge
17 Hearing Division
18 Arizona Corporation Commission
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Phoenix, Arizona 85007

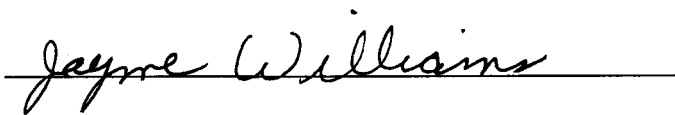
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